No. 84-849

Office-Supreme Court, U.S.
FILED
NOV 26 1984
ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE - - - Petitioner

versus

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID NORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY - - - - - - - - - Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit misapplied the holding in *Hutto* v. *Finney,* 437 U. S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978), when it ruled that the Commonwealth of Kentucky was liable for attorneys' fees under 42 USC § 1988 even though the Commonwealth had been dismissed as a party defendant and even though the relief granted the plaintiffs against the remaining party defendants was strictly retrospective in nature.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding before the United States District Court for the United States Court of Appeals for the Sixth Circuit.

James E. Graham, James D. Graham, Charles McClain, Fay Manion, Shelby Manion, and Rose Ella McClain were the plaintiffs before the United States District Court. The remaining parties were defendants before the trial court. The sole appellant in the Sixth Circuit was the Commonwealth of Kentucky, d/b/a Bureau of State Police.

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IN THE

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No. _____

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BUREAU OF STATE POLICE - - - Petitioner

v.

JAMES E. GRAHAM, JAMES D. GRAHAM, CHARLES McCLAIN, FAY MANION, SHELBY MANION, ROSE ELLA McCLAIN, ROBERT WILSON, DAVID NORRIS, HERBERT BENNETT, RONALD WILSON, WAYNE CREEKMORE, HAROLD ANTLE, ELLIS ROSS, CLYDE WYATT, GLENN P. DALTON, JAMES B. JONES, MICHAEL ANDERSON, GLEN TILFORD, BRUCE W. SLACK, HOLMES T. STILES, SAMUEL STEWART, JOSEPH W. EDWARDS, DEWEY SKAGGS, CHARLES DAVID LOGSDON, OVERLIN PAYNE, DAVID OWSLEY, TOMMY MASTERSON, CITY OF ELIZABETHTOWN, KENTUCKY, HARDIN COUNTY, KENTUCKY, KENNETH BRANDENBURGH, Individually and as Commissioner of the Bureau of State Police, JAY McREYNOLDS, RICHARD McQUOWN, TERRY HAMMOND, DAVE WILLIAMS, MICHAEL KIPPER, JOHN CARR, EDDIE LAIR, ROBERT ALAN FOSTER, JOHN ROBEY, J. E. COX, RODNEY CIRCLE, and CITY OF HODGENVILLE, KENTUCKY - - - - - - - - - Respondents

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Commonwealth of Kentucky, d/b/a Bureau of State Police, respectfully prays that a writ

of certiorari issue to review the Opinion and Order of United States Court of Appeals for the Sixth Circuit entered August 30, 1984.

OPINION BELOW

The *per curiam* Opinion and Order of the United States Court of Appeals for the Sixth Circuit in this case is an unpublished opinion. It is nevertheless listed among the unpublished opinions as *Graham* v. *Wilson,* 742 F. 2d 1455 (6th Cir. 1984). A copy of this opinion is set out in full in the Appendix, 1a-2a.

JURISDICTION

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit was entered on August 30, 1984. This petition for writ of certiorari was filed with the Clerk of the United States Supreme Court within ninety (90) days of August 30, 1984.

28 USC § 1254(1) has conferred on this Court jurisdiction to review by writ of certiorari decisions of the United States Court of Appeals for the Sixth Circuit. This Court should grant the writ of certiorari under Rule 17.1(a) and (c) of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Eleventh Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 USC § 1988.

STATEMENT OF THE CASE

On November 7, 1979, Kentucky State Trooper Eddie Harris was shot in cold blood at point blank range. Clyde Daniel Graham became the chief suspect when his step-mother's car was found in the vicinity with his driver's license and billfold being found in the bushes nearby. The Kentucky State Police assembled a group of troopers and searched the home of Clyde's father, James E. "Buddy" Graham. The six plaintiffs were arrested at this time. Minor physical injuries were caused to Buddy Graham. State Police Commissioner Kenneth Brandenburgh was not present nor did he participate in the initial decision to go to Graham's home. Commissioner Brandenburgh drove to the Elizabethtown vicinity; however, he did not participate in any actions.

The plaintiffs filed suit on September 16, 1980, against the Commonwealth of Kentucky, the named state police officers in their individual capacities, the Commissioner of the Kentucky State Police, Kenneth Brandenburgh in both his individual and official capacity, the City of Elizabethtown, the City of Hodgenville, and named officers of the City of Elizabethtown, the City of Hodgenville, and Hardin County. The plaintiffs only sought monetary damages. They have not sought injunctive or declaratory relief at any time.

The Commonwealth of Kentucky was dismissed as a party on November 26, 1980. See Appendix p. 15a. The Court's Order dismissed the Commonwealth of Kentucky based on the Eleventh Amendment to the

United States Constitution. The Court further stated in its order that:

> . . . The relief sought by the plaintiffs is retrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan,* 440 U. S. 332 (1979), *Hutto* v. *Finney,* 437 U. S. 678 (1978), and *Edelman* v. *Jordan,* 415 U. S. 651 (1974), that attorney's fees may be awarded against the state in an action by a private litigate only when the renef sought is prospective in nature . . .

The Commonwealth of Kentucky did not participate in any further portions of this case. The Attorney General of Kentucky filed a report after investigating the incident in question. The report concluded that the officers acted in an unprofessional manner and used excessive force on the plaintiffs. See Appendix, pp. 27a & 28a. As a consequence of these officers' failure to observe state policy, the Commonwealth of Kentucky has not supported the individually named Kentucky State Police troopers nor Commissioner Brandenburgh in any manner. Each of these individuals has been represented by a private attorney who was paid by private funds throughout the case. The Commonwealth of Kentucky has not contributed or paid any of the troopers or the Commissioner's cost of litigation. The Commonwealth of Kentucky specifically did not contribute in any form or fashion to the monetary damages that the defendants agreed to pay. The Commonwealth of Kentucky was not notified of any negotiations to settle this case and did not participate in the negotiations.

The Commonwealth was not served with and did not see a copy of the *in camera* settlement until after both the appellant's and appellees' briefs were filed in the United States Court of Appeals for the Sixth Circuit. In other words the resulting July 1, 1982, settlement was fashioned without the Commonwealth of Kentucky being represented. This settlement details that the plaintiffs shall receive $45,000 in damages paid on an installment basis from Commissioner Brandenburgh personally and as agent for the Kentucky State Police Legal Fund, a voluntary association. The City of Elizabethtown had previously settled with the plaintiffs for $5,000.00. Hardin County settled with the plaintiffs for $10,000.00. The District Court did not assess any costs or attorney's fees against either the City of Elizabethtown or Hardin County.

On July 1, 1982, the District Court entered an order styled, Agreed Order Dismissing Settled. The settlement is as follows:

"By agreement of the parties, it is ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.
2. No fault having been found as to any claim against the Defendant, Kenneth Brandenburgh, this action is dismissed settled, with prejudice, at the defendant's cost.

3. The counterclaims of the Defendants, Williams, Kipper and Hammond against the Plaintiffs are dismissed with prejudice.
4. No claims for attorneys' fees shall be made by any party plaintiff against any of the individual party defendants or the Kentucky State Police Legal Fund, a voluntary association.
5. Nothing set forth herein shall prevent any party plaintiff or party defendant from making a claim against the Commonwealth of Kentucky for legal fees and court costs and/or recovery of payments made pursuant to this order, which claims against the Commonwealth are specifically reserved." Appendix, pp. 16a & 17a.

No attorney for the Commonwealth signed the Agreed Order nor was advised of the Order until after the fact. The Commonwealth likewise had no knowledge of the language of underlying settlement until over sixteen months later.

On September 2, 1982, Judge Allen signed an *ex parte* order granting the plaintiffs attorney's fees from the Commonwealth of Kentucky. Appendix, p. 18a. The Commonwealth had no notice prior to the signing of this Order that attorney's fees were being sought. The Commonwealth filed a Motion to Vacate the Order granting attorney's fees and supporting Memoranda. The Court held a hearing on November 2, 1982, to decide if attorney's fees should be allowed, and if allowed, the amount of the fees. On November 15, 1982, the Court found that the Commonwealth was responsible for the plaintiff's costs in the amount of $64,878.82

including $58,521.71 in attorney's fees even though the Commonwealth and Commissioner Brandenburgh had been dismissed as a party, and even though the troopers were dismissed as parties. Appendix, pp. 12a, 13a. Perhaps it is even more important to note that the plaintiffs sought only retrospective damages. The plaintiffs did not ask for nor did they receive declaratory or injunctive relief at any time. In connection with the foregoing relief, the Court directed that no claim for attorney's fees shall be made by any of the plaintiffs against any individual defendants. Appendix, pp. 15a-17a. The court did not assess any costs in action against either Hardin County or the City of Elizabethtown.

The United States Court of Appeals for the Sixth Circuit upheld the lower court's decision.

ARGUMENTS AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

The United States Court of Appeals for the Sixth Circuit has in the case at bar rendered a decision which conflicts with those of other federal courts of appeals on the same matter. In its *per curiam* opinion, the Sixth Circuit decided an important question of federal law which has not been but should be settled by this court. Further, in reaching its conclusion, the Sixth Circuit decided a question in a manner which is inconsistent with the applicable decisions of this Court.

I. The Decision Is Contrary to That of Other Courts of Appeals

In the case at bar, the Court of Appeals for the Sixth Circuit affirmed the judgment of the United

States District Court for the Western District of Kentucky awarding plaintiffs in a 42 USC § 1983 suit $64,878.82 in costs including $58,521.71 in attorneys' fees against the Commonwealth. In its opinion the Sixth Circuit reasoned that it was proper under *Hutto* v. *Finney,* 437 U. S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978) to award under 42 USC § 1988 costs including attorneys' fees against the state in a civil rights action even though the state was dismissed as a party defendant, and even though the damages awarded against the remaining party defendants were strictly retrospective in nature. This decision requires the Commonwealth of Kentucky to pay costs in a civil rights action in which the relief was limited to damages despite the fact that the Commonwealth was a prevailing party as to the plantiffs.

This holding is at odds with the decisions reached by the United States Court of Appeals for the Third Circuit in *Morrison* v. *Fox,* 660 F. 2d 87 (3rd Cir. 1981), and by the United States Court of Appeals for the Fifth Circuit in *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980) cert. den. 450 U. S. 983, 101 S. Ct. 1521, 67 L. Ed. 2d 819 (1981), and in *Berry* v. *McLemore,* 670 F. 2d 30 (5th Cir. 1982).

In *Morrison, supra,* the Court of Appeals for the Third Circuit considered a case wherein Morrison sued the City of Pittsburgh and several of its police officers under 42 USC § 1983 for false arrest. In a non-jury trial the district court found for Morrison as to the police officers and awarded damages. The court found

for the City of Pittsburgh as to the claim of Morrison because the evidence failed to demonstrate that the individual acts of the police officers were an implementation of the city's policy. No prospective relief was awarded. The district court awarded Morrison an attorney's fee against the officers but not against the city. In affirming the denial of an attorney's fee against the City of Pittsburgh, the Court of Appeals said:

> "* * * Before Morrison can obtain costs he must, against the city, be a prevailing party. In a case such as this, in which he sought only money damages, and in which he failed to satisfy the court that his case satisfied the standards of *Monell* v. *Department of Social Services, supra,* he does not qualify as the prevailing party with respect to the only claim which was before the court . . . ." *Morrison, Id.,* p. 88.

In *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980), the United States Court of Appeals considered a civil rights action against a county, city, and law enforcement officers for unlawful arrest and for cruel and unusual punishment. The district court dismissed the county and city from the action but rendered a judgment on a jury verdict against two law enforcement officers. The court awarded attorneys' fees against the law enforcement officers but not against the county and city. No injunctive relief was fashioned. In reviewing the denial of attorneys' fees against the county and city, the Fifth Circuit said:

> "* * * Appellants have cited no authority for the proposition that attorneys' fees may be awarded against parties properly dismissed from the action merely because they were 'prevailing parties' with respect to other parties in the suit. Indeed, an award against Brazoria County and the City of Clute under the circumstances of this case would turn the meaning of 'prevailing party' on its head, since the district court expressly found, as a matter of law, that neither entity was liable to the appellants. The failure to award attorneys' fees against Brazoria County and the City of Clute was proper." *Dean, supra,* pp. 1337, 1338.

Two years later in *Berry* v. *McLemore,* 670 F. 2d 30 (5th Cir. 1982), the Fifth Circuit reiterated its position. In *Berry, Id.,* the plaintiff filed a civil rights action against the Town of Maben, Mississippi and McLemore, a police officer employed by the town. The plaintiff sustained injuries during an arrest made by McLemore. Berry alleged that the town was liable vicariously and directly for the injuries. The trial court directed a verdict for the town and entered a judgment pursuant to a jury verdict for the plaintiff against the police officer in the amount of $10,000. The court assessed the police officer $5,000 in attorneys' fees. The court refused to award attorneys' fees against the town. No prospective relief was granted. In affirming the refusal of the trial court to assess attorneys' fees against the town the Fifth Circuit said:

> "* * * A plaintiff in a § 1983 suit may not be awarded attorneys' fees against a party properly dismissed from the action merely because the plaintiff prevailed against another party in the suit. This is so even where the party dismissed from

the suit is the governmental entity that employed the culpable defendant. *Dean* v. *Gladney*, 621 F. 2d 1331, 1337-38, (5th Cir. 1980), *cert. denied*, 450 U. S. 983, 101 S. Ct. 1521, 67 L. Ed. 2d 819 (1981)." *Berry, supra*, p. 34.

In *Morrison, supra; Dean, supra;* and *Berry, supra*, the respective Courts of Appeals held that where no prospective relief was awarded any defendant, and where the county or municipality was properly dismissed as a party defendant, no attorneys' fees could be assessed against the county or municipality. The decisions in these cases are contrary to that reached in the case at bar.

II. The Court Below Misapplied *Hutto, supra*.

Not only is the decision of the United States Court of Appeals for the Sixth Circuit in the instant case at odds with decisions on the same point from the Third and the Fifth Circuits, the decision determines an important question of federal law not settled by this Court based upon a misapplication and unwarranted extension of the opinion of this Court in *Hutto, supra*.

In *Edelman* v. *Jordan*, 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974), this Court made it clear that the Eleventh Amendment to the United States Constitution operates as a bar to retrospective relief against a state. This Court also made it quite clear that the Eleventh Amendment did not bar prospective relief against state officers and any ancillary fiscal consequences to state treasuries which are necessary in complying with the terms of the order granting prospective relief.

In *Hutto, supra*, this Court considered a civil rights action against officers of the Arkansas penal system. The district court found that the conditions in the Arkansas penal system constituted cruel and unusual punishment and fashioned injunctive relief to remedy the situation. The district court also found bad faith on the part of the defendants and awarded the plaintiff an attorney's fee to be paid out of the funds of the Arkansas Department of Corrections. The Court of Appeals affirmed and awarded the appellee an attorney's fee as a prevailing party under 42 USC § 1988. In approving of the award of the attorney's fees, this Court held that in adopting 42 USC § 1988 Congress intended to override the Eleventh Amendment and to authorize an attorney's fee award when an aggrieved party prevailed against state officials even in absence of a finding of bad faith.

The legislative history to 42 USC § 1988 makes it clear that the purpose of 42 USC § 1988 was to promote public policy by enforcing the civil rights laws. In other words 42 USC §1988 was adopted to promote the use of a "private attorney general" to preserve the rights of the people.

> "* * * There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot

> enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." Senate Report No. 94-1011, 94th Congress, Second Session, 1976, 5 U. S. Code Congressional and Administrative News 5908, p. 6.

It is apparent from the legislative history that what Congress had in mind when it adopted 42 USC § 1988 was enforcement. 42 USC § 1988 authorizes attorneys' fees when the courts grant prospective relief against state officers. 42 USC § 1988 was not intended to authorize attorneys' fees when damages alone are awarded.

Edelman, supra, held that the Eleventh Amendment is a bar to retrospective relief against a state but that it is not a bar to prospective relief against a state officer with an ancillary affect on the state treasury. *Hutto, supra,* held that attorney's fees are properly part of the ancillary affect on the state treasury when prospective relief is granted.

The situation in *Hutto, Id.,* was exactly that contemplated by Congress. The relief granted was prospective in nature. It was against state officers. This court approved of the award of attorneys' fees. The award had an impact on the Arkansas treasury ancillary to the injunctive relief granted.

On the other hand, the situation in the case at bar is vastly different from that in *Hutto.* In the instant case there was no prospective relief. The relief was strictly retrospective in nature. The Sixth Circuit held *Hutto, Id.,* to be applicable and awarded costs including attorney's fees directly against the Commonwealth of Kentucky. The Court awarded no costs against any of the other named defendants either in their individual or official capacities. The Sixth Circuit's decision is in total disregard of the Eleventh Amendment. The Sixth Circuit has decided an important question of federal law, which has not been decided by this Court but should be. Further, the Sxith Circuit has decided the question by misapplying and extending *Hutto, supra.*

The decision of the Sixth Circuit in the instant case is also contrary to the policy of this Court announced in *Hensley* v. *Eckerhart,* —— U. S. ——, 76 L. Ed. 2d 40, 103 S. Ct. —— (1983). In *Hensley, Id.,* p. 54, this Court said:

> "We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 USC § 1988 [42 USCS § 1988]. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."

The Eleventh Amendment to the United States Constitution is a bar to an action against a state. It, of course, has no application when a municipality is involved. However, in *Monell* v. *New York City Department of Social Services,* 436 U. S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), this Court held that municipalities cannot be held liable solely on the basis of vicarious liability. In order to support a claim against a municipality for a violation of civil rights, a party

must demonstrate that the officers of the municipality were by their acts advancing a policy adapted by the town.

A state may not be named as a party defendant by virtue of the Eleventh Amendment. Nevertheless, it is proper when prospective relief is fashioned against state officers for the remedy to have an ancillary affect on the state treasury. But this surely does not mean when a state is involved rather than a municipality that the party seeking such an ancillary benefit as attorneys' fees should be held to a lesser standard of proof as to whether the officer is following state policy. Yet this is exactly what has occurred in the instant case. The Sixth Circuit has affirmed an award of attorneys fees against the Commonwealth of Kentucky. This award was made solely on the basis of *respondeat superior* and in violation of *Monell, supra,* since there was no proof that the Commonwealth of Kentucky had adopted a policy approving conduct such as was exhibited by the police officer in the search of the Graham house. In fact, the proof shows exactly the opposite. The appendix to the memorandum submitted by the Attorney General in support of his Motion to Vacate the Order Granting Attorney's Fees contains a portion of a Report of the Attorney General. Appendix, pp. 19a-25a. The report concludes that the officers acted in an unprofessional manner and used excessive force on the plaintiffs. Appendix, pp. 25a-28a. The officers violated state policy during the search. In addition, the Commonwealth refused to either provide counsel

for the police officers or to pay costs or any damages assessed against the officers.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit in the case at bar is at odds with those from the Third and Fifth Circuits as to awarding costs including attorneys' fees against a state when the state is a prevailing party as to the plaintiff, and when the relief awarded is strictly retrospective in nature.

The decision of the Sixth Circuit misapplied a decision of this Court when it held that *Hutto, supra,* authorized an attorneys' fees in the case at bar. In *Hutto, Id.,* the relief was prospective, the Attorney General had defended the corrections officers all along, and state of Arkansas never indicated that the officers were violating state policy, the litigation involved the state policy as to prison conditions which had been perpetuated for years. On the other hand, in the instant case, the relief was strictly retrospective, the Commonwealth was dismissed as a party defendant, the Commonwealth did not provide for the representation of the officers and never supported them, and finally the Report of the Attorney General indicates that the police officers violated state policy.

We submit that this Court should grant a writ of certiorari for the foregoing reasons to review the Opinion and Order entered herein by the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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This is to certify that three copies of the foregoing Petition for Writ of Certiorari were sent, postage prepaid, to the following counsels of record on this 26th day of November, 1984.

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APPENDIX

NOT FOR PUBLICATION

No. 82-5778

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES E. GRAHAM; JAMES D. GRAHAM; CHARLES McCLAIN; FAY MANION; SHELBY MANION; ROSE ELLA McCLAIN, - - *Plaintiffs-Appellees,*

v.

ROBERT WILSON, et al., - - - - *Defendants,*

COMMONWEALTH OF KENTUCKY, d/b/a BUREAU OF STATE POLICE, - - - *Defendant-Appellant.*

On Appeal from the United States District Court
For the Western District of Kentucky

Filed August 30, 1984

BEFORE: ENGEL and MARTIN, Circuit Judges; and KRENZLER*, District Judge.

PER CURIAM. The Commonwealth of Kentucky appeals the award of attorney fees in this section 1983 action brought against members of the Kentucky state police organization.

We need not state the facts other than to acknowledge a settlement of the action during the trial. After the settlement, the district court awarded the plaintiffs $58,521.70 in attorney's fees against the Commonwealth pursuant to

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*Honorable Alvin I. Krenzler, United States District Judge for the Northern District of Ohio, sitting by designation.

42 U.S.C. § 1988. On appeal the Commonwealth argues that it was not liable in fees because it had been previously dismissed from the lawsuit. We disagree. It is well settled that a section 1988 attorney's fee award may run against a public treasury for section 1983 violations even when the state is not a party to the action. *Hutto* v. *Finney,* 437 U. S. 678, 699, 98 S. Ct. 2565, 2578 (1978).

Moreover, there is no record upon which the Commonwealth may rely to contest the amount awarded. This court does not discern any abuse of discretion by the district court in the award.

Accordingly, the judgment is affirmed.

Issued as mandate: September 21, 1984

Costs: None

A True Copy
Attest:
JOHN P. HEHMAN, Clerk
(s) By Audrey Corbett
Deputy Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 80-0464 L(A)

JAMES E. GRAHAM, et al., - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This action is submitted to the Court for decision following evidence taken as to the claim of the plaintiffs for attorneys' fees to be paid by the Commonwealth of Kentucky, and following the submission of a motion by the Commonwealth requesting the Court to reconsider its previous order granting in principal attorney's fees against it.

On September 16, 1980, the plaintiffs filed this action against sixteen State Troopers, the Commissioner of the State Police, Kenneth Brandenburgh, four Hardin County Law Enforcement Officers, one Elizabethtown Officer, and against the Commonwealth of Kentucky, Hardin County and the City of Elizabethtown. Subsequently, the complaint was amended to add nine additional Kentucky State Police Officers. The complaint, as amended, sought damages for the six plaintiffs arising out of an alleged illegal search, false arrest, malicious prosecution, and the use of excessive force as to certain plaintiffs by the defendant, all in violation of 42 U.S.C. Sec. 1983. The pleadings also

allege conspiracy on the part of defendant Brandenburgh in allowing these allegedly illegal acts to take place.

In October, 1980, after the taking of the deposition of Brandenburgh, which was attended by two attorneys of the Department of Justice of Kentucky, an order was entered by this Court dismissing the action as to the Commonwealth. Subsequent to that order of dismissal, the case came on for trial on May 25, 1982, and after two days of negotiations between the parties, a settlement agreement was arrived at whereby plaintiffs would receive a total of $60,000, $45,000 of which would be paid by Brandenburgh and the State Police Defense Fund, $10,000 by Hardin County, and $5,000 by the City of Elizabethtown. The plaintiffs specifically preserved the right to prosecute against the Commonwealth their claim for attorneys' fees and costs, and they now assert a claim for $109,988.37, plus expenses of $6,842.12.

It should be observed that the claims of the plaintiffs arose out of events which occurred on the night of November 7th and during the early morning of November 8th, 1979. Briefly stated, it was developed by extensive discovery that following the cold-blooded shooting of Kentucky State Trooper Harris, with the chief suspect being Clyde Graham, the Kentucky State Police assembled a force of some 30 to 40 officers at Elizabethtown and made two warrantless searches of the home of James E. "Buddy" Graham and arrested the six plaintiffs. Also, it was developed that physical injuries were caused to James E. "Buddy" Graham. Commissioner Brandenburgh denied in his deposition having anything to do with the tactics used by the State Police, although he was in the vicinity of the Graham residence at the second search.

Subsequent to the events which took place November 7th and 8th, 1979, Clyde Graham was killed in Illinois by members of the Kentucky State Police and a great deal of publicity arose after the shooting. As a result of the pub-

licity, although Commissioner Brandenburgh had been conducting his own investigation into the Illinois shooting, it was decided on September 20, 1980 to have the Department of Justice of Kentucky conduct an independent investigation which was finally released on September 2, 1981. The independent investigation also recounted the events which occurred on the night of November 7th and 8th, 1979, relative to the search of the home of Buddy Graham and the arrest of the plaintiffs. The language in Title 42 U.S.C. Sec. 1988, Public Law 94-559 is very broad using the words "in any action" and therefore on its face does not seem to be limited to an action for damages under 42 U.S.C. Sec. 1983. In addition, it is significant to note that the statute specifically refers to the allowance of attorneys' fees to the prevailing party as part of the *costs*.

In *Hutto* v. *Finney*, 437 U. S. 678 (1978), the Supreme Court authorized the award of fees against the State of Arkansas in an injunctive proceeding in which the State was not a party. In so doing, the court referred specifically on p. 695 to the fact that it had never viewed the Eleventh Amendment as barring costs against the States even in suits between States and individual litigants. While *Hutto* did not involve a case in which damages were awarded to the plaintiff, cases such as *Rainey* v. *Jackson State College*, 551 F. 2d 672 (5th Cir. 1977) and *Sargeant* v. *Sharp*, 579 F. 2d 645 (1st Cir. 1978), make it clear that 42 U.S.C. Sec. 1888 does, indeed, authorize the imposition of fees as against a State or a municipal body where damages are awarded to the plaintiff.

The Commonwealth contends that it would be inequitable to allow attorneys' fees against the State when the State did not represent Brandenburgh through its Attorney General, and since the State took no part in the settlement proceedings and since the settlement proceedings stated on their face that Brandenburgh was without fault, although

he is obligated to pay the sum of $45,000 as the result of his actions which, along with those of other defendants, led to this lawsuit. None of these arguments are meritorious. *Maher* v. *Gagne,* 448 U. S. 122 (1980) holds that a plaintiff who has succeeded in obtaining some relief through a settlement is entitled to an attorney's fee just as he would have been if he had gone to trial and obtained a judgment. Here, there was a money settlement and plaintiffs' actions from the very beginning had been directed toward the obtaining of damages.

The fact that the Commonwealth had been dismissed as a party does not prevent the plaintiff from recovering attorneys' fees from the Commonwealth. As the Supreme Court stated in *Hutto* v. *Finney, supra,* and as the legislative history of 42 U.S.C. Sec. 1988 makes clear, a State or municipal body does not have to be a party to an action brought under 42 U.S.C. Sec. 1983 in order to be liable for attorneys' fees. Congress plainly contemplated that in many instances the recovery of attorneys' fees in a civil rights action should come from the State or municipal body rather than the individual official involved.

The significance of 42 U.S.C. Sec. 1988 is its insistence upon the proposition that where a State or municipal body has persons in authority who violated the civil rights of citizens, the State or municipal body should not be allowed to escape the payment of attorneys' fees where the plaintiffs whose rights have been violated have been the prevailing parties. See the Legislative Report attached to PL-1 and cited as "Appendix I and II" in the opinion of *Zarcone* v. *Perry,* 438 F. Supp. 788 (E.D. N.Y. 1977), at pp. 792-796.

In the case at bar, it was the action of the highest ranking police officer of the Commonwealth, coupled with the actions of many other police officers of the Commonwealth and with a few law enforcement officers of Hardin County and Elizabethtown which brought about the violations the

plaintiffs alleged in this lawsuit, and which resulted in the settlement described previously. The employment of private counsel by Brandenburgh and other State Police does not eradicate the fact that the actions of Brandenburgh and the other officers were taken in their official capacities. It is, therefore, only just that the State be compelled to bear the attorneys' fees which are designed to make the plaintiffs whole for the alleged violations of their civil rights.

We reach the conclusion in this unique case that plaintiffs are entitled to recover attorneys' fees from the Commonwealth for that portion of the work expended by their attorneys against the Kentucky State Police Officers and Kenneth Brandenburgh.

The fee schedule submitted by plaintiff's counsel requests that Daniel B. Boone and Jack M. Lowery be awarded fees at the rate of $135 per hour for 89½ hours expended by Mr. Boone and 485½ hours expended by Mr. Lowery. It also asks for fees at the rate of $85 per hour for Hollis L. Searcy, who allegedly expended 300¼ hours.

The testimony of William Miller, an experienced attorney of some 40 years practice in Louisville, was introduced and was to the effect that he believed that the rates requested by plaintiffs were reasonable. Mr. Oliver Barber was introduced as a witness for the Commonwealth and testified that he accepted a rate of $60 per hour from the Commonwealth for the services which he performed in the Eddyville litigation which resulted in a consent decree signed by the Honorable Edward H. Johnstone, District Judge. Mr. Barber freely admitted that his fees in the private area of practice could be as high as $125 per hour in his specialty of mental health and $80 to $100 per hour in areas in which he was not a specialist.

The Court is of the opinion that Messrs. Boone and Lowery, who are experienced attorneys, are entitled to receive fees at the rate of $90 per hour for work done other than trial-connected work. For trial connected work, by

which the Court means the work done on the day of trial and the day following it, which resulted in the settlement, they should receive a fee at the rate of $125 per hour. As for Mr. Searcy, his office work should be compensated at the rate of $70 per hour since he has only four to six years experience during the pendency of this litigation, and the trial connected work at the rate of $95 per hour.

In setting fees in a case of this sort, the leading case is that of *Northcross* v. *Board of Education of Memphis City Schools,* 611 F. 2d 624 (6th Cir. 1979). That case suggests that a duplication factor in a relatively small percentage of cases, generally speaking, is appropriate where the court finds that there has been some duplication in the efforts of counsel. In the case at bar, the Court finds the duplication factor to be 10% after examination of the occasions on which Mr. Lowery and Mr. Searcy conferred on the same subject, and on those occasions when they, plus Mr. Boone conferred together.

The question next arises as to whether or not plaintiffs' attorneys are entitled to a contingency factor such as was awarded in *Northcross, supra.* In *Northcross* at p. 638, the court points out that an attorney's regular hourly billing is based upon an expectation of payment win, lose or draw. It then points out that these regular rates will be adjusted upwards to compensate for the risk that the attorney is accepting of not being paid at all. The court then goes on to hold that where the facts are strong and the law is clear and where there is little risk of losing, the attorney's regular hourly rate will be adequate. In other cases where the facts are strongly disputed or where the law is uncertain, it will require a substantial upward adjustment of their hourly rates. We assume, therefore, that plaintiffs only seek to have the Court fix reasonable rates without making an upward adjustment for the contingency factor.

We observe also that since this is a multi-party action, a considerable portion of plaintiffs' attorneys' time was devoted to the preparation of their case against the County of Hardin and City of Elizabethtown. Without undertaking the laborious task of assuming every entry made by plaintiffs' counsel in their log of work time, the Court believes that it would be proper to determine that plaintiffs' counsel devoted 20% of their time to claims that did not involve Brandenburgh and the individual members of the Kentucky State Police. We note that there were 29 State Policemen involved as well as Brandenburgh, and only 4 Hardin County Law Enforcement Officers and one Elizabethtown Officer. We note also that the deposition of Brandenburgh was considerably longer than those of any other deponent, except those of the plaintiffs themselves. Also, we note that the settlement called for Hardin County and Elizabethtown to pay only one-fourth of the total amount involved.

Finally, we note that *Sargeant* v. *Sharp, supra,* is persuasive to the effect that in cases involving contingent fees the Court should be careful to insure that plaintiffs' counsel do not receive a windfall and do not receive their contingency fees from their clients, plus the award from the Court. The proper manner of handling the matter, *Sargeant* suggests, is for the Court to exercise its supervisory powers to fashion its order to insure that the award goes to compensate the client and not to overcompensate counsel. See 579 F. 2d at 648.

In the instant case, counsel has stated to the Court that they have a contingent fee arrangement with their clients which provides for a 50% payment. The fee award in the case at bar is $58,521.70,* that award being larger than the contingent fee which would be received by counsel. Ar-

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*See Appendix for mathematical computation of attorneys' fees.

rangements should be made between plaintiffs' counsel and their clients whereby plaintiffs are made whole and do not pay out any sums in attorneys' fees with the amount awarded by the Court to go to the attorneys. See *Sargeant, supra,* at p. 649 stating that the award should reimburse the plaintiff with the excess over the amount set by the fee arrangement going to her counsel. That statement was made in light of the fact that the principal attorney had already received a contingent portion of the approximately $89,000 recovery as a contingent fee.

In the case at bar, it is the understanding of the Court that plaintiffs' counsel to date have received as fees the sum of $15,000. As to the matter of costs, *Northcross, supra,* allows the prevailing party to recover reasonable out-of-pocket expenses incurred by its counsel which are usually charged to a fee-paying client in the course of providing legal services. Reasonable photo-copying, paralegal expenses and travel and telephone costs are, thus, recoverable pursuant to 42 U.S.C. Sec. 1988. See *Northcross,* at p. 639. Other costs which are normally provided for under 28 U.S.C. Sec. 1920 are on a different footing and ordinarily are taxed by the Court pursuant to the statute. See pp. 639-640.

In the instant case, the plaintiffs have lumped together the two types of costs, but in the interest of judicial economy, the Court will also consider them together and render one award for them. The Court has reviewed the itemization of expenses incurred and finds only one improper item which is, in fact, a duplication under the heading of "Dick Odle transcript September 25, 1980 $485." That item appears on both page 1 and page 2 of the itemization and should be stricken from the sum of $6,842.12 requested by counsel for plaintiffs. While the items of telephone expenses and mailing expenses are not set out in detail and there having been no objection made thereto, they are allowable, and the total amount of costs recoverable is $6,357.12.

A judgment in accordance with this opinion has been entered this day.

Dated: 11-15-82

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

APPENDIX

The fee award in this case has been arrived at in the following manner. The Court, in the case of all three attorneys, looked to the number of hours claimed by each attorney and multiplied them by 72%. The percentage figures took into consideration 20% of their time being devoted to non-State defendants, and the duplication factor of 10%, which was applied against the 80% remaining after the deduction for work done, against non-State defendants. The Court then multiplied the resulting number of office hours times $90 per hour in the case of Messrs. Boone and Lowery and $70 per hour in the case of Mr. Searcy.

With respect to court time for which Messrs. Lowery and Searcy claimed 20 hours and Mr. Boone claimed 4 hours, the Court reduced those hours by a factor of 10% and then multiplied the resulting figure by $125 per hour in the case of Messrs. Boone and Lowery and $95 per hour in the case of Mr. Searcy.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 80-0464 L(A)

JAMES E. GRAHAM, et al., - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - *Defendants.*

JUDGMENT

Plaintiffs, having moved the Court for attorney's fees in the amount of $103,146.25 and expenses in the amount of $6,842.12, and the Court, being fully advised in the premises and having filed is memorandum opinion.

IT IS ORDERED AND ADJUDGED as follows:

The Commonwealth of Kentucky shall pay to Daniel B. Boone the sum of $6,003.10, to Jack M. Lowery the sum of $36,684.00 and to Hollis L. Searcy the sum of $15,834.60.

IT IS FURTHER ORDERED AND ADJUDGED that the Commonwealth of Kentucky shall pay to plaintiffs and their counsel jointly the sum of $6,357.12 as expenses.

IT IS FURTHER ORDERED AND ADJUDGED that counsel for plaintiffs shall refund to their clients any sums received by them as a contingent fee immediately after counsel receives payment of their fees from the Commonwealth of Kentucky.

This is a final and appealable judgment and there is no just cause for delay.

Dated 11-15-82

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 80-0464 L(A)

JAMES E. GRAHAM, et al., - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - *Defendants.*

ORDER

Defendant, Commonwealth of Kentucky, having moved to dismiss this action on the grounds that the Eleventh Amendment to the Constitution of the United States bars it, and it appearing to the Court that the relief sought by the plaintiffs is retrospective in nature and not prospective, and that the United States Supreme Court has held in *Quern* v. *Jordan*, 440 U. S. 332 (1979), *Hutto* v. *Finney*, 437 U. S. 678 (1978) and *Edelman* v. *Jordan*, 415 U. S. 651 (1974) that attorney's fees may be rewarded against a state in an action by a private litigant only when the relief sought is prospective in nature,

IT IS ORDEERD that the motion to dismiss be and it is hereby sustained.

This is not a final and appealable order.

Dated 11-26-80

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C80-0464-L (A)

JAMES E. GRAHAM; JAMES D. GRAHAM; CHARLES McCLAIN; FAYE MANION; SHELBY MANION and ROSE ELLA McCLAIN - - - - - *Plaintiffs*

v.

ROBERT WILSON, et al. - - - - - *Defendants*

AGREED ORDER DISMISSING AND AGREED ORDER DISMISSING SETTLED

* * * *

By agreement of the parties, it is ordered:

1. No fault having been found, this action is dismissed with prejudice against Defendants, Antle, Dalton, Tilford, Stiles, Creekmore, Ross, Anderson, Edwards, Slack, Robert Wilson, Norris, Ronald Wilson, Jones, Stewart, Williams, Kipper, Hammond, Wyatt, Robey, McReynolds, Foster, McQuown and Bennett.

2. No fault having been found as to any claim against the Defendant, Kenneth Brandeburgh, this action is dismissed settled, with prejudice, at the defendant's cost.

3. The counterclaims of the Defendants, Williams, Kipper and Hammond against the Plaintiffs are dismissed with prejudice.

4. No claims for attorneys' fees shall be made by any party plaintiff against any of the individual party defendants or the Kentucky State Police Legal Fund, a voluntary association.

5. Nothing set forth herein shall prevent any party plaintiff or party defendant from making a claim against the Commonwealth of Kentucky for legal fees and court costs and/or recovery of payments made pursuant to this order, which claims against the Commonwealth are specifically reserved.

(s) Charles M. Allen
Judge Charles M. Allen,
Chief Judge
Date: 7-1-82

Have Seen and Agreed To:

(s) Daniel Boone
Daniel Boone,
Attorney for Plaintiff

(s) Hollis Searcy,
Hollis Searcy
Attorney for Plaintiff

(s) Gary R. Hillerich
Gary R. Hillerich,
Attorney for defendants,
Bennett, Antle, Dalton, Tilford and Stiles

(s) William E. Johnson
William E. Johnson,
Attorney for Defendants,
Creekmore, Ross, Anderson, Edward,
Slack, Robey and McReynolds

(s) Frank H. Dickey
Frank Dickey
Attorney for Defendant,
Kenneth Brandenburgh

(s) William F. Woodward,
William F. Woodward
Attorney for Defendant,
Kenneth Brandenburgh

(s) Larry D. Raikes
Larry D. Raikes,
Attorney for Defendants,
Robert Wilson, Norris, Ronald Wilson,
Jones, Stewart, McQuown and Foster

(s) Rick Cusick
Rick Cusick
Attorney for Defendants,
Williams, Kipper and Hammond

(s) Charles D. Greenwell
Charles D. Greenwell,
Attorney for Defendant,
Clyde Wyatt

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

C-80-0464-L (A)

JAMES E. GRAHAM, et al., - - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - - *Defendants.*

ORDER—Entered September 2, 1982

On Motion of the Plaintiffs, by counsel, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that counsel for the Plaintiffs shall be awarded attorney's fees for their services in the above-styled action assessable against the Commonwealth of Kentucky and this cause is assigned to the 15th day of October, 1982, at 10:00 A.M. for hearing as to the amount of said attorney's fees.

(s) Charles M. Allen
Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C80-0464L(A)

JAMES E. GRAHAM, et al., - - - - - *Plaintiffs,*

v

ROBERT WILSON, et al., - - - - - *Defendants.*

MEMORANDUM IN SUPPORT OF MOTION TO VACATE THE ORDER GRANTING ATTORNEY'S FEES

Comes the Commonwealth of Kentucky, by and through its Attorney General, and in support of the Motion to Vacate the Order Granting Plaintiff's Attorney's Fees states the following:

On November 26, 1980, this Court entered an order dismissing the Commonwealth from this law suit on the grounds that the Eleventh Amendment to the United States Constitution barred the law suit and because the relief sought by the plaintiffs was retrospective in nature rather than prospective. Also in that order this Court correctly found that attorneys' fees may be awarded against the state in an action by a private litigant only where the relief sought is prospective in nature. *Hutto* v. *Finney,* 437 U. S. 678, 572 L. Ed. 2d 522, 98 S. Ct. 2565 (1978); *Edelman* v. *Jordon,* 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); *Quern* v. *Jordan,* 44 U. S. 332, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979).

After having been dismissed from the suit and not having participated in the suit or any settlement negotiations, the Commonwealth was served with a copy of this Court's July 1, 1982, order dismissing the suit as settled and also awarding plaintiffs' attorneys' fees against the Commonwealth. Needless to say, the Commonwealth is severely prejudiced by being brought into this suit at such a late date. It cannot be overemphasized that after the Commonwealth was dismissed, it did not participate in this case either directly or indirectly by supporting any defendants through payment of damages, legal representation, or fees.

The Commonwealth of Kentucky has acted in good faith throughout this matter and has never condoned the actions of the Kentucky State Police. In fact, a report issued by the Kentucky Attorney General's Office in September, 1981, was of the opinion that, based upon the evidence reviewed, that the officers involved acted in an unprofessional manner and used excessive force on the plaintiffs. (See Commonwealth's appendix to this memorandum consisting of excerpts from the report of the Attorney General regarding his conclusions on the search of the Graham residence). The Commonwealth has steadfastly refused to provide counsel to the defendants and to pay for the defendant's attorney's fees, cost or any damage award assessed against them.

Because the Commonwealth is not now a party, and has not been a party defendant in the last two years, this Court has no authority to assess attorneys' fees against the Commonwealth in its own name. The parties in this case entered in an *in camera* settlement regarding the payment of damages, responsibility for payment of attorneys' fees and other unknowns. The Commonwealth was not privy to these settlement negotiations and has, to this date, not seen the settlement agreement. Incredibly, the plaintiffs assert that the Commonwealth is bound to pay the attorneys' fees

by virtue of the terms of the settlement agreement to which the Commonwealth was not even a party. One begins to wonder if something is amiss if one can be bound *in absentia* to a settlement to which it is not a party. Very simply, the plaintiffs and defendants cannot bind the Commonwealth to a settlement to which it was not a party.

Further, the Commonwealth submits that because Kenneth Brandenburgh, former Commissioner of State Police was dismissed from the suit in this Court's order of July 1, 1982, he is not now before this Court. Because all claims have been dismissed against Brandenburgh in his individual and official capacity, and because he is no longer a party, the plaintiffs have no cause of action against him in any form. Nor can the plaintiffs reach the Commonwealth through Brandenburgh because he is not before the Court.

Another factor militating against the award of attorneys' fees in this case is that the plaintiffs are not prevailing parties within the meaning of 428 U.S.C. 1988. This case was settled by all parties who were not dismissed outright by the Court. Because no admissions concerning proof of fault exist by virtue of the terms of the court's order itself, the plaintiffs have not demonstrated that they prevailed on any issues.

The plaintiffs rely heavily on *Hutto* v. *Finney, supra,* in support for the claim of attorneys' fees against the Commonwealth. The Commonwealth will demonstrate that this reliance is clearly misplaced. The fact situation in *Hutto, supra,* involved an award of attorneys' fees upon the granting of *injunctive relief,* which was prospective in nature. Further, the Court in *Hutto* noted that since the state officials, who were found to have acted in *bad faith,* were sued in their official capacities and since the officials were represented throughout the proceedings by the Arkansas Attorney General, the award of attorneys' fees was properly paid with state funds. *Hutto* at 536. The facts in the case at bar differ completely from *Hutto.*

The relief sought in the case *sub judice* was for damages and not injunctive in nature. The Commonwealth of Kentucky has acted in good faith throughout this matter. The Commonwealth never condoned the actions of the officers in the case at bar, and therefore steadfastly refused to provide them with legal representation. The Commonwealth also has refused to pay for any of the defendant's attorneys' fees, costs or damages assessed against them. Although the officers in the case at bar were probably sued in their *individual and official capacities,* the damage settlement was, in essence, a settlement by them individually. Support for this position is garnered from the fact that the damage award, and the defendant's attorneys 'fees and costs were paid with *private* funds. This, coupled with the fact that the Commonwealth did not represent the defendants, is consistent with the position that these named defendants acted outside the scope of their official duties. As such, it is not appropriate to grant attorneys' fees against the Commonwealth.

It must be remembered that the grant of attorneys' fees is not mandatory in civil rights cases, it is purely discretionary. Civil Rights Attorneys' Fees Awards Act of 1976 (amending 42 U.S.C. 1988). In the case of *Zarcone* v. *Perry,* 438 F. Supp. 788 (D.C. N.Y., 1977), affd. 581 F. 2d 1039 (2nd Cir.), the court held that the plaintiff was not entitled to an award of attorneys' fees under 42 U.S.C.A. 1988 (as amended), since the plaintiff's cause of action was basically a tort action and only in a general sense did the plaintiff's successful litigation vindicate the public's right to due process. The Court explained further that an award of fees under 42 U.S.C.A. 1988 is not mandatory, and that because discretionary authority was preserved in the amendment, this indicated a congressional intent that some prevailing parties should not be awarded attorney's fees. More importantly, the court stated that

prevailing parties are not routinely granted attorney's fees simply because they are awarded damages. It is only when plaintiffs advance the public interest that an award of attorney's fees is proper. This Court, in the case *sub judice,* is essentially dealing with a tort action for assault. As such, under the reasoning of *Zarcone, supra,* an award of attorney's fees is not proper.

Another factor in this case which makes the Commonwealth responsible for the payment of the attorneys' fees improper, is the fact that the damage award was paid by the defendants with private funds. The Commonwealth submits that this is prima facie evidence that the defendants acted outside the scope of their official capacity. In such a situation the defendant's are personally liable for the damage award given the plaintiffs. *Bishop* v. *Tice,* 622 F. 2d 349 (8th Cir. 1980). It naturally follows then, that if the officials acted outside the scope of their official capacity, and are thus liable for the payment of a damage award, then they should be personally liable for the award of attorney's fees in such a situation. *Universal Amusement Co., Inc.* v. *Hofbeing,* 616 F. 2d 202 (5th Cir. 1980).

Lastly, the Commonwealth submits that the amount of the settlement itself should be considered along with the basis of the action when awarding attorney's fees. *Zarcone, supra.* The case of *Buxton* v. *Patel,* 595 F. 2d 1182 (9th Cir. 1979), stands for the proposition that where adequate compensation could be given plaintiffs' attorneys from the damage award, the purposes of 42 U.S.C.A. 1988 are not served. The Court listed several factors to be considered: 1) if the action is the result of a *single violation,* 2) amount of damages recovered, and 3) whether the alleged violation of rights was indicative of a broad violation of rights affecting the public. See also: *Zarcone, supra.* Obviously, the Commonwealth is at a distinct disadvantage in arguing that the damage award should be used in paying for the

attorneys' fees. The Commonwealth does not know the amount of the damage award because it has not been made privy to the terms of the settlement agreement which was negotiated between the parties without the participation and approval of the Commonwealth. However, when the factors outlined in *Buxton, supra,* and *Zarcone, supra,* are applied to the facts of this case, an award of attorneys' fees against the state, or any other defendant for that matter, is improper.

Based on the above, the Commonwealth requests this Court to vacate its order granting the plaintiffs' attorneys' fees payable by the state.

Respectfully submitted,

Steven L. Beshear
Attorney General

(s) Paul E. Reilender, Jr.
Paul E. Reilender, Jr.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494
Counsel for Defendants

NOTICE

Please take notice that the foregoing Memorandum In Support of Motion to Vacate the Order Granting Attorney's Fees will be mailed, first class postage prepaid, to the Clerk of the United States District Court for the Western District of Kentucky at Louisville, this the 26th day of October, 1982, to be considered at the convenience of the Court.

Paul E. Reilender, Jr.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum In Support of Motion to Vacate the Order Granting Attorney's Fees was mailed, first class postage prepaid, to Hon. Daniel Boone and Hon. Jack Lowery, 231 South Fifth Street, Louisville, KY 40202, counsel for plaintiffs, Hon. Cathy Cravens Snell, Justice Cabinet, Office of General Counsel, State Office Building, Franfort, KY 40601; Hon. Hobson L. James, 12 The Mall, Elizabethtown, KY 42701; Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, KY 40202; Hon. William E. Johnson, Johnson, Judy & Gaines, Box 756, Frankfort, KY 40602; Hon. Charles Landrum, Jr., Landrum, Patterson & Dickey, 201 Security Trust Building, Short & Mill Streets, Lexington, KY 40507 and Woodward, Hobson & Fulton, 2510 First National Tower, Louisville, KY 40202; Hon. Larry D. Raikes, P.O. Box 88, 206 W. Water, Hodgenville, KY 42748; Hon. Charles D. Greenwell, Middleton & Reutlinger, 501 S. Second Street, Louisville, KY 40202; Hon. C. Michael Weldon, Collier, Arnett & Coleman, 128 W. Dixie Avenue, Elizabethtown, KY 42701; Hon. Bert T. Combs, Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, KY 40202; Hon. Reford H. Coleman, Collier, Arnett & Coleman, 128 West Dixie Avenue, P.O. Box 847, Elizabethtown, KY 42701; Hon. Jack E. Ruck, Wallace, Gordinier, Wilson Ruck & Cooper, 2250 Citizens Plaza, Louisville, KY 40202; Hon. Carl Howell, Jr., One Financial Center, Hodgenville, KY 42728; Hon. Wade Richardson, Richardson, Richardson & Miller, Brandenburg, KY 40108; and Hon. Richard G. Segal, 1517 Kentucky Home Life Building, Louisville, KY 40202, counsel for defendants, this the 26th day of October, 1982.

Paul E. Reilender, Jr.
Assistant Attorney General

APPENDIX

CONCLUSIONS

After reviewing all of the information obtained during the investigation into the murder of Kentucky State Police Trooper Eddie Harris and the subsequent shooting death of Clyde Daniel Graham by Kentucky State Police Sgt. Eugene Coffey in Effingham, Illinois, the Office of the Attorney General concludes the following:

1. *The Death of Kentucky State Police Trooper Eddie Harris*

   All of the available evidence overwhelmingly indicates that Clyde Daniel Graham shot and killed Kentucky State Police Trooper Eddie Harris without provocation.

2. *The November 7-8, 1979 Search of the Graham Residence by Law Enforcement Authorities*

   a. The requisite leadership by the Elizabethtown Kentucky State Police command staff, from the post commander down, was lacking on the night of November 7, 1979. This lack of leadership resulted in confusion by state police personnel as to assignments and in the convergence of an excessive number of troopers at the Graham residence to participate in a search which rapidly became uncontrolled.

   b. The evidence indicates that certain Kentucky State Police personnel used execssive force against James D. "Jimmy" Graham during the search of the Graham residence on the night of November 7, 1979.

      It is noted that conflicting testimony concerning the use of excessive force in the arrest of James E. "Buddy" Graham, Charles McLain and James D.

Graham on the night of November 7, 1979, at the Graham residence has been considered by two juries, one in the United States District Court in Louisville, Kentucky, during the trial of James E. "Buddy" Graham on charges of harboring a fugitive, etc. and one in the trial of these three individuals in Hardin District Court on the charges of disorderly conduct and resisting arrest. The jury in the federal case acquitted James E. "Buddy" Graham on all charges, while the jury in the state case convicted James E. "Buddy" Graham and Charles McLain of disorderly conduct and resisting arrest, while acquitting James D. Graham of all charges. It is further noted that the law allows a defendant, when said defendant believes that such force is necessary to protect himself, to use physical force if the arresting officer is using more force than is reasonably necessary to effect the arrest. (See KRS 503.050(1); KRS 503.-060(1) and Commentary).

Therefore, while there is some question raised as to whether excessive force was used in the arrest of James E. "Buddy" Graham and Charles McLain, there seemed to be no question in the mind of either jury concerning the use of excessive force in the arrest of James D. "Jimmy" Graham. No one interviewed admitted striking any of these individuals, other than the one blow struck by Trooper Harold Antle to Charles McLain, and no one interviewed identified anyone as striking any other blows.

c. The above actions by both the post command staff and certain individual state troopers demonstrated an obvious lack of professionalism on their part and a complete breakdown of the discipline demanded of such highly trained law enforcement officials. While the existence at that time of a highly charged, emo-

tional atmosphere among members of the Kentucky State Police is certainly understandable because of the gruesome murder of their comrade, Trooper Eddie Harris, and their knowledge of the past criminal activities of some of the individuals involved, this cannot justify the unprofessional actions referred to above. Therefore, this report is being forwarded to the Secretary of the Kentucky Department of Justice and the Commissioner of the Kentucky State Police for whatever action they deem appropriate to insure that such actions will not recur.

3. *The Death of Clyde Daniel Graham in Effingham, Illinois*

   a. While questions can be raised concerning the appropriateness of the plan to effect the

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